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Before the
UNITED STATES COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of MECHANICAL AND DIGITAL PHONORECORD DELIVERY RATE ADJUSTMENT PROCEEDING	)	Docket No. 96-4 CARP DPRA

GENERAL COUNSEL
OF COPYRIGHT

JAN 23 1998

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JOINT REPLY COMMENTS SUBMITTED BY
NATIONAL MUSIC PUBLISHERS' ASSOCIATION, INC.,
THE SONGWRITERS GUILD OF AMERICA AND
RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.

National Music Publishers' Association, Inc. ("NMPA"), The Songwriters Guild of America ("SGA") and the Recording Industry Association of America, Inc. ("RIAA") (collectively the "Petitioners") appreciate this opportunity to reply to the comments received by the Copyright Office in connection with the Notice of Proposed Rulemaking (the "Notice") in the above-captioned proceeding.

Background

On November 7, 1997, the Petitioners filed with the Copyright Office a Joint Petition for Adjustment of Physical Phonorecord and Digital Phonorecord Delivery Royalty Rates (the "Joint Petition"). In the Joint Petition, we asked the Copyright Office to promulgate regulations adjusting royalty rates under the mechanical compulsory license of 17 U.S.C. § 115 as proposed in the Joint Petition.

Based on the Joint Petition, the Copyright Office issued its Notice on December 1, 1997. The Copyright Office received comments on the Notice from the Coalition of Internet Webcasters ("CIW"), the United States Telephone Association ("USTA") and Broadcast Music, Inc. ("BMI"). On January 13, 1998, the Copyright Office invited the Petitioners to submit these reply comments.

As we read the comments of CIW, USTA and BMI, there does not appear to be any controversy concerning the subject matter of this proceeding and of the proposed regulations, that is, the statutory royalty rates under Section 115 of the Copyright Act. Instead, CIW and USTA assert that the proposed regulations improperly seek to expand the scope of the Digital Performance Right in Sound Recordings Act of 1995 ("DPRA") by declaring certain kinds of Internet transmissions to be "digital phonorecord deliveries" ("DPDs"). The proposed regulations, however, merely track the language of the DPRA with respect to DPDs. Plainly, this proceeding is not the appropriate forum to seek relief from the terms of the statute. The relief sought by CIW and USTA is outside the scope of this proceeding and beyond the authority of the Copyright Office or a copyright arbitration royalty panel ("CARP").

BMI's comments seek only affirmation of an unassailable principle concerning performance rights which, we believe, is set forth quite clearly in the DPRA.

Significantly, none of the commentators requests that a CARP be empaneled or quarrels with the rates and terms for compulsory licenses set forth in the

proposed regulations -- the only matters that the DPRA provides be resolved by a CARP. 17 U.S.C. § 115(c)(3)(D).

The Petitioners do not believe that any of the commentators has raised an issue that should preclude adoption of the proposed regulations. However, we note that it should be possible to address any legitimate concerns the commentators might have through minor clarifications either in the text of the regulations or in the *Federal Register* notice of their adoption. The Petitioners would have no objection to such minor clarifications.

In the remainder of these reply comments we address each of these points in turn.

CIW and USTA Do Not Object to Anything the
Proposed Regulations Actually Say That is Not Required by Law

Both CIW and USTA object to Section 255.6 of the proposed regulations. This section addresses what the proposed regulations call "Incidental DPDs," or digital phonorecord deliveries "where the reproduction or distribution of a phonorecord is incidental to the transmission which constitutes the digital phonorecord delivery." Notice, § 255.6(a). CIW and USTA seem to object to the very inclusion in the proposed regulations of a provision addressing Incidental DPDs. For example, CIW alleges that Section 255.6(a) "creates" this category of digital phonorecord deliveries. CIW Comments, at 4. Both CIW and USTA criticize the definition of the term "Incidental DPD." *Id.*, at 3-4; USTA Comments, at 1-2.

Of course, Section 255.6 of the proposed regulations does not "create" the category of Incidental DPDs. Incidental DPDs were made part of U.S. copyright law by Congress, using *precisely* the words of Section 255.6 of the proposed regulations: "where the reproduction or distribution of a phonorecord is incidental to the transmission which constitutes the digital phonorecord delivery." 17 U.S.C. § 115(c)(3)(C), (D). The DPRA not only creates this category of Incidental DPDs, but also *requires* that mechanical royalty rates distinguish between Incidental DPDs and digital phonorecord deliveries in general. *Id.* Thus, it would be an abdication of the statutory responsibilities of the Copyright Office or a CARP not to address specifically in this proceeding mechanical royalty rates for Incidental DPDs.

Beyond CIW's and USTA's criticism of the DPRA itself, the specific element of the proposed regulations to which CIW and USTA object is Section 255.6(b). That paragraph provides that no royalty will be payable under the mechanical compulsory license for certain "Transient Phonorecords." CIW and USTA evidently are concerned that adoption of Section 255.6(b) will prejudice the positions that they may wish to take in the courts or before Congress on the question of whether Transient Phonorecords infringe a copyright owner's reproduction right. However, Section 255.6(b) does not declare that the making of Transient Phonorecords infringes a copyright owner's reproduction right. The Petitioners agree with CIW and USTA that the courts or Congress should resolve this question, and that it should not be resolved in this proceeding. Thus, the question for this proceeding is what should be the royalty

rate for a Transient Phonorecord if it constitutes an Incidental DPD. Representing users of musical works, RIAA strongly favored the inclusion of Section 255.6(b) because it is far better from the perspective of a user to pay nothing for a Transient Phonorecord that constitutes an Incidental DPD than to pay the full statutory royalty. Representing the owners of musical works, NMPA and SGA acknowledged the fairness of this position, as reflected in the proposed regulations. Section 255.6(b) does *not* seek to regulate reproductions that do not constitute DPDs as defined in the Copyright Act, 17 U.S.C. § 115(d).

CIW and USTA Ask the Copyright Office to Establish a Precedent-Setting Interpretation of the DPRA to Further Their Own Legislative and Political Agendas

While CIW and USTA assert that the Petitioners are using Section 255.6(b) to establish in this proceeding a precedent-setting interpretation of the DPRA, it is CIW and USTA, not the Petitioners, that would like to take advantage of this proceeding to further their own legislative and political agendas.

The centerpiece of CIW's argument is that "the activities involved in the delivery of streaming media to the user -- the making of temporary copies that enable transmission and performance -- are beyond the scope of the statute and, hence, beyond the regulatory authority of the Copyright Office." CIW Comments, at 4. CIW states that "these [streaming media] technologies should be declared to be outside the reach of section 115," *id.*, and "completely exempt[ed]," *id.*, at 5. CIW reiterates that "[a]n exemption is warranted." *Id.*

In the context of a proceeding to determine royalty rates under the mechanical compulsory license, it is not entirely clear what exemption CIW wants. It would not be in CIW's interest to remain subject to the exclusive rights of a copyright owner but be denied the benefits of the mechanical compulsory license. Thus, it appears that what CIW wants is to have its members' activities exempted by regulation from the exclusive reproduction and distribution rights of copyright owners under 17 U.S.C. § 106(1) and (3). It is not necessary to this proceeding for the Copyright Office or a CARP to express a view on the question of whether use of streaming media infringes the reproduction and distribution rights. More so, it is beyond the scope of their authority under the DPRA to do so. However, if the use of streaming media does infringe the reproduction and distribution rights of copyright owners as a matter of law, it would be "inconsistent with law" -- and thus outside the authority of the Register of Copyrights under 17 U.S.C. § 702 -- to grant CIW an exemption from the reproduction and distribution rights of copyright owners.

Similarly, USTA states that "actions occurring automatically during the course of a transmission by an intermediary service provider are outside of the scope of the Act. The proposed regulation should make this clear." USTA Comments, at 4. It is not the purpose of this proceeding to resolve the online service provider liability issues that are, as USTA notes, the subject of an "ongoing legislative process." *Id.*, at 2. Thus, it would not be appropriate for the Copyright Office or a CARP to express a view in this proceeding on the question of whether online service providers engage in

acts of reproduction and distribution that are eligible for the mechanical compulsory license. Moreover, if online service providers do engage in such acts as a matter of law, neither the Copyright Office nor a CARP has the authority to do more than provide what the applicable royalty rate (if any) and license terms shall be -- as the proposed regulations do.[1/]

BMI Seeks Only Affirmation of an Unassailable Principle
That is Beyond the Scope of This Proceeding

BMI is a music performing rights organization, and as such has no interest in reproduction and distribution of physical phonorecords or digital phonorecord deliveries. Indeed, many of BMI's members are represented with respect to the subject matter of this proceeding by NMPA and SGA.

BMI asks the Copyright Office to "clarify that the Section 115 compulsory license does not apply to any rights of public performance that may exist in the digital transmissions subject to the compulsory license." BMI Comments, at 3. The Petitioners certainly agree with the principle of copyright law articulated by BMI. One could hardly disagree, given the statement in Section 115 of the Copyright Act that "[n]othing in this section annuls or limits . . . the exclusive right to publicly perform a

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[1/] The authority of a CARP empaneled pursuant to section 115 is "to determine and publish in the Federal Register *a schedule of rates and terms*" for the issuance of compulsory licenses under that section. 17 U.S.C. § 115(c)(3)(D) (emphasis added).

sound recording or the musical work embodied therein, including by means of digital transmission, under sections 106(4) and 106(6) . . . ." 17 U.S.C. § 115(c)(3)(K).

The Petitioners did not think to include in the proposed regulations the clarification sought by BMI because reproduction, distribution and performance are distinct and independently licensable copyright rights. Even though there has been a mechanical compulsory license since 1909, and the compulsory license has applied to digital phonorecord deliveries since 1996, the Petitioners are not aware of any past suggestion that the compulsory license permits performance any more than a BMI license can permit reproduction and distribution. Performance rights simply are beyond the scope of the mechanical compulsory license and this proceeding.

Any Legitimate Concerns the Commentators Might Have
Can Be Addressed Through Minor Clarifications

Although there does not appear to be any controversy concerning the subject matter of this proceeding, the Petitioners would have no objection to minor clarifications that should be sufficient to address any legitimate concerns the commentators might have.

It appears that the only specific aspect of the proposed regulations to which CIW and USTA object (other than those that are dictated by the DPRA, as to which there can be no standing to object) is the possible implication from Section 255.6(b) that transmissions leading to the making of Transient Phonorecords necessarily

are DPDs. We certainly have never understood the regulations prescribing mechanical royalty rates to suggest that a royalty must be paid under the compulsory license even if a particular activity is outside the exclusive rights of the copyright owner or not covered by a compulsory license. To make this more clear, we would have no objection to adding the following at the beginning of Section 255.6(b):

> If making a "Transient Phonorecord" constitutes
> a digital phonorecord delivery as defined in
> 17 U.S.C. § 115(d), then

With this clarification, the proposed regulations by definition cannot exceed the scope of the DPRA.

Similarly, while the Petitioners do not believe it is necessary to make the clarification sought by BMI, we have no objection to doing so, either in the text of the regulations or in the *Federal Register* notice of their adoption.

Conclusion

As a result of the comments received, even in the absence of any real controversy concerning the subject matter of this proceeding, the proposed regulations did not become effective on January 1, 1998 as requested by the Petitioners and specified in the Copyright Office's Notice. NMPA and SGA are concerned that their members will be prejudiced by this delay. For the reasons set forth above, the Petitioners respectfully request that the Copyright Office adopt the proposed

regulations promptly, perhaps with the clarifications described above, and request that the rate adjustments set forth in the regulations be made retroactive to January 1, 1998.

Respectfully Submitted,

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January 23, 1998

William Roberts, Esquire
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Dear Mr. Roberts:

On behalf of the National Music Publishers' Association, Inc., The Songwriters Guild of America and the Recording Industry Association of America, Inc., I am pleased to submit the enclosed Joint Reply Comments in the mechanical compulsory license rate adjustment proceeding.

Sincerely,

Steven R. Englund

Enclosure